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Supreme Court of the United States

OCTOBER TERM, 1957

No. 80

JOHN HENRY HARMON, III, *Petitioner*,

v.

WILBER M. BRUCKER, Individually and as Secretary of the Department of the Army, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

INTRODUCTORY STATEMENT

Respondent's brief proceeds in large measure on an avoidance of the basic question before this Court. That question, as Judge Bazelon said in his dissent below, is "whether the Universal Military Training and Service Act of 1948, 62 Stat. 606, 50 U.S.C.A. App. § 454 (b), pursuant to which Directive 5210.9 was promulgated, authorizes issuance of less than an honorable discharge certificate in the circumstances of this case."[1] That is the basic question for decision by this

[1] 243 F.2d 613, at p. 627.

Court, and while respondent includes it in his counter-statement of "Questions Presented,"[2] he spends a major portion of his brief avoiding it. Rather, in two separated sections of his brief, respondent argues that his action did not invade any of petitioner's legally protected rights (*Res. Br.* 58-70), and that the character of petitioner's discharge certificate is not subject to judicial review. *Res. Br.* 22-58. We think the basic question is put in clearer focus if these two issues are discussed together.

I.

THE DISTRICT COURT HAD JURISDICTION TO REVIEW RESPONDENT'S ACTION

The argument that the District Court has no jurisdiction to review the issuance of a less-than "Honorable Discharge" not only overlooks the nature and character of the military discharge certificate, it also fails to consider the valuable status which an "Honorable Discharge" confers. Moreover, the contention that none of petitioner's legally protected rights were invaded completely ignores respondent's destruction of that *status* as well as his stigmatization of petitioner's record of military service—a record which, on the other than political considerations, warranted an "Honorable Discharge."

A. Petitioner Has Suffered Injury to a Legally Protected Right.

Respondent's argument that no legal injury was caused by the issuance of a "General Discharge Under Honorable Conditions" (*Res. Br.* 58-70) was twice rejected by the court below. The first time was on

[2] *Res. Br.* 2.

August 17, 1956 when it denied respondent's suggestion of mootness (R. 120); the second time, as Judge Bazelon points out, when in dealing with the question of jurisdiction, "it [seemingly] rejected the contention that there is no longer a judicially cognizable case or controversy" (243 F.2d 613, 625, ftn. 7) Cf. *Friedman* v. *International Association of Machinists* (C.A.D.C.), 220 F.2d 808, 810, cert. den., 350 U.S. 824. Indeed, since Judge Prettyman's majority opinion extensively discusses the constitutional issues (243 F.2d 613, 620-622), it is apparent that both majority and minority below found a sufficient *locus standi* in this case. Moreover it "seems nothing short of an absurdity for the Government to contend, even with respect to a general discharge, that distinctions made with all the formality incident to a military discharge * * * really make no difference so far as the serviceman is concerned." Jones, *Jurisdiction Of The Federal Courts To Review The Character Of Military Administrative Discharges,* 57 Col. L. Rev. 917, 928 (1957).

In addition, however, respondent asserts that the omission of the words, "AR 604-10 applies" from Harmon's discharge certificate and DD Form 214 shows that petitioner has not been stigmatized as a "security

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[3] This assertion is spurious. As we pointed out at page 43 of our main brief, since "petitioner has not yet received the 'general (under honorable conditions) discharge' proffered him on June 6, 1956, it must be presumed that respondent will correct this omission from petitioner's DD Form 214 [and insert the words: 'AR 604-10 applies'] in conformity with the requirements of Department of Defense Directive 5210.9, Par. VIII(F)(6), and AR 604-10, Par. 19(b). See, *Ramspeck* v. *Federal Trial Examiners Conference,* 345 U.S. 128, 142-143; *R. H. Stearns Co.* v. *United States,* 291 U.S. 54, 63; *United States* v. *Chemical Foundation,* 272 U.S. 1, 14-15." Rather than meet this issue, respondent makes the bald assertion that the presumption of administrative regularity does not apply

risk.'"[3] And in any event, he argues, there is nothing inherently defamatory in a "security risk" discharge from the military service. *Res. Br.* 64-70. According to respondent, such a determination cannot be equated to a determination excluding one from public employment on disloyalty grounds,[4] or to the designation of an organization as "communist,"[5] or to a determination that a reasonable doubt exists as to an employee's loyalty,[6] and he points to his concession in the district court "that he has never found [petitioner] either disloyal or loyal." *Res. Br.* 65, ftn. 49a. But, in *Cole* v. *Young*, 351 U.S. 536, the Government also conceded that Cole, whose continued retention in Federal employment was "not clearly consistent with the interests of national security" under Executive Order 10450, "was not charged with being disloyal and that none of the charges implied any disloyalty on his part."[7] There, too, the Government claimed that an employee removed from Federal employment as a "security risk"

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when an administrative regulation is challenged as illegal. *Res. Br.* 64, ftn. 49. But unless this Court strikes down Department of Defense Directive 5210.9, Par. VIII (F)(5) and AR 604-10, both the Directive and the Regulation remain in full force and effect, and a mistake on a discharge certificate can always be corrected. *13 Op. Atty. Gen. 201* (1870). Indeed, since both the Directive and the regulation have been upheld as valid the presumption that respondent will correct his prior omission from petitioner's DD Form 214 to conform with the requirements of Department of Defense Directive 5210.9, Par. VIII (F)(6), and AR 604-10, Par. 19(b) cannot be avoided. *Pet. Br.* 42-45.

[4] *Wieman* v. *Updegraff*, 344 U.S. 183, at pp. 190-191.

[5] *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, at p. 125.

[6] *Peters* v. *Hobby*, 349 U.S. 331, at p. 347.

[7] *Cole* v. *Young*, 351 U.S. 536, *Petitioner's Brief*, No. 442, October Term, 1955, p. 5.

does not wear the badge of infamy.[8] Nevertheless, this Court said that "*in view of the stigma attached to persons dismissed on loyalty grounds*, the need for procedural safeguards seems even greater than in other cases, and we will not lightly assume that Congress intended to take away those safeguards in the absence of some overriding necessity * * *." *Cole* v. *Young*, *supra*, at pp. 546-547 (emphasis supplied). The very same is true here; we have already pointed out that insofar as the public is concerned the term "security risk" is synonymous with "traitor." *Pet. Br.* 45.[9]

When respondent likens the action petitioner complains of to those cases in which "the courts have refused to grant relief to civil servants dismissed on charges involving serious criminal misconduct" (Res. Br. 65-68), he points up the basic fallacy of his case. A military discharge certificate is not a "Notification of Personnel Action" which terminates the services of a federal employee from his job. So much is clear from both the nature and history of the military discharge certificate and the valuable status which it confers. *Pet. Br.* 28-36. He further compounds this error when he fails to distinguish between the validity of Department of Defense Directive, Par. VII (A), providing that retention in the armed services shall not be inconsistent with the interests of national secu-

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[8] *Op. cit. supra*, *Respondent's Brief*, No. 442, October Term, 1955, p. 65.

[9] See also, *Watkins* v. *United States*, 354 U.S. 178, 77 S. Ct. 1173, 1184; *Sweezy* v. *New Hampshire*, 354 U.S. 234, 77 S. Ct. 1203, 1210; *Hearings, Senate Subcommittee on Constitutional Rights, Pursuant to S. Res. 94*, 84th Cong. 2d Sess., November 23, 1955, at pp. 627-628; Jones, *Jurisdiction Of The Federal Courts To Review The Character Of Military Administrative Discharges*, 57 Col. L. Rev. 917, 925, 928-929 (1957).

rity, and the invalidity of Par. VIII (F)(5) of the Directive, which provides that the character of the separation certificate of the individual so removed *"shall be predicated upon the gravity of the reasonably substantiated information in derogation."* And finally, when respondent urges that petitioner's claim of actionable defamation rests upon a valid determination made *within the scope of his authority*, and that such action is not injury to "a legally protected right" (*Res. Br.* 67-68), he necessarily joins issue on the basic question before this Court, *i.e.*, "whether the Universal Military Training and Service Act of 1948, 62 Stat. 606, 50 U.S.C.A. App. §454(b), pursuant to which Directive 5210.9 was promulgated, authorizes issuance of less than an 'Honorable Discharge' certificate in the circumstances of this case." Respondent cannot avoid a determination of this question by asserting that the District Court lacked jurisdiction to review the invalidly authorized and unconstitutional action taken in the case at bar.[9a]

B. Congress Has Not Precluded Judicial Review.

Since an "Honorable Discharge" is "a formal, final judgment passed by the Government upon the entire

[9a] Jurisdiction of the cause in the District Court was based on Sections 11-305 and 11-306 of the District of Columbia Code (as well as on 28 U.S.C. 1331, 2201, 2202 and 5 U.S.C. 109) (R. 2). Thus, if respondent was not authorized to issue petitioner a less-than "Honorable Discharge" certificate for constitutionally protected conduct extraneous to the character of his military service, *mandamus* will lie to compel the issuance of a discharge certificate in accordance with the provisions of *AR 615-360, Par. 8a.* See, *Work* v. *United States ex rel. Rives*, 267 U.S. 175, 177; Jones, *Jurisdiction Of The Federal Courts To Review The Character Of Military Administrative Discharges*, 57 Col. L. Rev. 917, 939-940, 956-957 (1957).

military record of the soldier, and an authoritative declaration by it that he ha[s] left the service in a status of honor * * *,'"[10] the discharge certificate confers a *valuable status.* See, *United States ex rel Hirshberg* v. *Cooke,* 336 U.S. 210. Thus, even if the District Court had no jurisdiction to interfere with respondent's discretion, or to compel him to issue petitioner an "Honorable Discharge" certificate, it undoubtedly had jurisdiction to declare invalid the issuance of a less-than "Honorable Discharge" certificate for unconstitutional and invalid reasons. See, *Perkins* v. *Elg,* 307 U.S. 325, 349-350; *McGrath* v. *Kristensen,* 340 U.S. 162, 169-171.[11] The legal authorities cited in support of respondent's extensive argument that Congress has never given district courts jurisdiction to review the issuance of military discharge certificates (*Res. Br.* 42-58) in no

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[10] *United States* v. *Kelly,* 15 Wall. 34, 82 U.S. 34, 36; *In re Fong Chew Chung* (9 Cir.), 149 F.2d 904, 906; *Ex parte Dranier* (D.C., Cal.), 65 F. Supp. 410, 411, affd. (9 Cir.), 158 F.2d 981. In the case at bar the District Judge said: "While the discharge certificate is issued by the military, it has tangible and practical consequences in civilian life. To an honorable discharge accrue property rights, civil rights, and community respect and honor. United States ex rel. Roberson v. Keating, D.C. Ill. 1949, 121 F.Supp. 477. Conversely, one receiving an adverse discharge certificate must expect to encounter substantial prejudice in civilian life." (137 F. Supp. 475, 478) See also, *Bernstein* v. *Herren* (D.C., SDNY), 136 F.Supp. 493, 496-497.

[11] In his concurring opinion *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123, Mr. Justice Jackson pointed out: "Ordinary dismissals from government service which violate no fixed tenure concern only the Executive branch, and courts will not review such discretionary action. * * * [But the] *fact that one may not have a legal right to get or keep a government post does not mean that he can be adjudged ineligible illegally. Id.,* at p. 185. (Emphasis supplied.) See also, *Rudder* v. *United States* (C.A. D.C.), 226 F.2d 51, 53; *Shachtman* v. *Dulles* (C.A. D.C.), 225 F.2d 938, 940-941.

wise support his conclusion. While some of the authorities indicate that the scope of the District Court's review is a limited one.[12] arbitrary or capricious administrative action, or action bottomed on an unconstitutional or *ultra vires* administrative regulation is historically a judicial preserve.[13]

Respondent argues that the legislative history of both Section 301 of the Servicemen's Readjustment Act of 1944, 58 Stat. 286, 38 U.S.C. 693h, and Section 207 of the Legislative Reorganization Act of 1946, 60 Stat. 837, 5 U.S.C. 191a demonstrate a Congressional intention to preclude judicial review of the action taken here *Res. Br.* 36-42. He repeatedly relies on the holding of the Court below in *Gentila* v. *Pace* (C.A.D.C.), 193 F. 2d 924, 927, cert. den. 342 U.S. 943, and contends that judicial review in the instant case would "increase the workload of the courts by a substantial percentage, an increase which Congress did not contemplate." *Res. Br.* 39. However, we think it clear that (1) Section 301 of the Servicemen's Readjustment Act of 1944, 58 Stat. 286, 38 U.S.C. 693h was not intended "to make the decisions of [the Army Discharge Review Board] any *more* nonreviewable than they otherwise would have been under prior law," (2) the

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[12] *E.g., Patterson* v. *Lamb*, 329 U.S. 539, 542; *Denby* v. *Berry* (C.A. D.C.), 279F. 317, 320, rev'd. on other grounds, 263 U.S. 29; *Davis* v. *Woodring* (C.A. D.C.), 111 F.2d 523, 525.

[13] *Pet. Br.* 17-24. Although the Court of Appeals for the Second Circuit did not pass on the question of judicial review in *Schustack* v. *Herren* (2 Cir.), 234 F.2d 134, at p. 136, it was undoubtedly the view of the late Judge Jerome Frank that the District Court did have jurisdiction to review the issuance of a less than "Honorable Discharge" certificate. See, *Michaelson* v. *Herren* (2 Cir.), 242 F.2d 693, 696, ftn. 6.

finality provision of Section 207 of the Legislative Reorganization Act of 1946, 60 Stat. 837, 5 U.S.C. 191a "actually was enacted with the intention that * * * decisions of the [Army Board for the Correction of Military Records] adverse to the veteran should be subject to the fullest judicial review" and (3) Congress, fully aware that 15,000 ex-servicemen were then seeking correction of their military records, intended that "the courts of the United States should not be precluded from reviewing such cases under appropriate circumstances." See, Jones, *Jurisdiction Of The Federal Courts To Review The Character Of Military Administrative Discharges*, 57 Col. L. Rev. 917, 966-971 (1957).[13a] In any event, notwithstanding the "finality" provision of Section 207 of the Legislative Reorganization Act of 1946, 60 Stat. 837, 5 U.S.C. 191a, the Court of Claims has repeatedly "reviewed" determinations of the Army Board for the Correction of Military Records when "arbitrary, capricious, or contrary to law." *Furlong* v. *United States* (Ct. Cl.), 152 F. Supp. 238, 241; *Propper* v. *United States* (Ct. Cl.), 154 F. Supp. 317, 325-327; *Wales* v. *United States* (Ct. Cl.), 130 F. Supp. 900, 904; *Gordon* v. *United States*, 129 Ct. Cl. 370, 121 F. Supp. 625, 629. And finally, Judge Bazelon, one of the three judges who sat on the panel that heard and decided the *Gentila* case, said in his dissent below:

[13a] Rather than extend the length of this reply brief by an extensive analysis of the legislative history of Section 301 of the Servicemen's Readjustment Act of 1944 and Section 207 of the Legislative Reorganization Act of 1946, counsel refers the Court to the complete and comprehensive analysis of the legislative history of those statutes in the *Columbia Law Review* article cited where the author has conclusively documented petitioner's assertion that Congress did not preclude judicial review of his case.

> "'Stripped of self-contradiction and legal conclusions, all that [Gentila's] complaint allege[d]' was that his dishonorable discharge for desertion rested upon 'an erroneous finding of fact' that he was mentally capable of forming an intent to desert. We held that 'merely erroneous findings of fact by the Discharge Review Board shall not be revised by a court.' * * * [But since petitioner's] claim [is] 'wholly dependent upon a question of law,' it is within the jurisdiction of the District Court. United States v. Williams, 1929, 278 U.S. 255, 257-58 * * *. Nothing in Gentila v. Pace, supra, is to the contrary." (243 F.2d 613, at pp. 626-7).

Accordingly, we think respondent's argument does not warrant serious consideration by this Court.

II.

DEPARTMENT OF DEFENSE DIRECTIVE 5210.9, PAR. VIII(F)(5) WAS INVALIDLY AUTHORIZED, ULTRA VIRES, AND VOID.

The Universal Military Training and Service Act of 1948, 62 Stat. 604, 50 U.S.C. App. 451, "is a comprehensive statute designed to provide an orderly, efficient and fair procedure to marshal the available manpower of the country, to impose a common obligation of military service on all physically fit young men." *United States* v. *Nugent*, 346 U.S. 1, 9. Section 4(b) of the Act provides that each person inducted into the armed forces thereunder shall serve on active training for a period of 24 consecutive months, "unless sooner released, transferred or discharged *in accordance with procedures prescribed by the Secretary of Defense* * * *." 62 Stat. 606, 50 U.S.C. App. 454(b). This authority was provided by Congress "in the general interest of sound and reasonable personnel man-

agement and policy" for the armed forces. *S. Rep. 1268 on S.2655*, 80th Cong., 2d Sess., p. 7 (1948). It was not designed "to delegate to the [military] political and social control over every young man subject to the Selective Service Law from the time of his mature understanding until he approaches thirty." Watts, *The Draftee and Internal Security, A Study of the Army Military Personnel Security Program* 9, (1955). "Yet, that is the effect of the Army's application of what it considers to be the law."[14]

The purpose of Department of Defense Directive 5210.9 was to extend "the critera for security programs established as national policy for *civilian personnel* by Executive Order 10450" to military personnel in the various Armed Services. *Directive, Par I (A) (1)* (R 34) [emphasis supplied]. Obviously, petitioner was not a civilian while in the Army. Equally certain is the fact that he was not a Government employee. Ever since the *Selective Draft Law Cases*, 245 U.S. 366, it has been held that induction for military service and other service incident thereto does not constitute involuntary servitude within the meaning of the Thirteenth Amendment. *Id.*, at p. 390. On the other hand, Executive Order 10450, 18 F.R. 2489, is based on the fundamental assumption that Government employment is a privilege and not a right. Cf. *Bailey* v. *Richardson* (C.A. D.C.), 182 F.2d 46, affd. by an equally divided court, 341 U.S. 918. But, if federal employment is a "privilege" and not a right, the conclusion that induction for military service does not constitute involuntary

[14] Watts, *Op. Cit., supra*, at p. 9. Cf. *Bernstein* v. *Herren* (D.C. SDNY), 136 F.Supp. 493, 496-499; see also, *Hearings, Senate Subcommittee on Constitutional Rights, Pursuant to S. Res. 94*, 84th Cong., 2d Sess., November 18, 21, 1955, at pp. 353-441, 465-534.

servitude can be justified only if the inductee is not a Government employee. Accordingly, the Department of Defense has made a fundamental error in attempting to adopt "the criteria for security programs established as national policy for *civilian personnel* by Executive Order 10450" to military personnel in the various Armed Services. *Directive, Par. I (A)(1)* (R. 34).[15] With this erroneous premise as a starting point, we can understand how respondent equates the issuance of a less-than "Honorable Discharge" certificate on charges involving constitutionally protected activities occurring prior to induction with dismissals of civil servants on charges involving serious criminal misconduct. *Res. Br.* 65-68. Under his theory it is simple to rationalize that if military service under the Universal Military Training and Service Act is a "privilege" like federal civilian employment, then a military discharge certificate is nothing more than a "Notification of Personnel Action" which terminates a federal employee from his job. But a military discharge certificate is not a "Notification of Personnel Action." It is "a formal, final judgment passed by the Government upon the entire military record of the soldier and an authoritative declaration by it that he [has] left the service in a status of honor * * *." *United States* v. *Kelly,* 15 Wall. 34, 82 U.S. 34, 36. The only reason respondent refuses to furnish an "Honorable Discharge" certificate to petitioner, a soldier with a record of military excellence, "is the

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[15] On April 8, 1954, Secretary of Defense Wilson said: "I think it is generally accepted and has been for many years, that serving your country in uniform is an honor and a privilege, and not a right." *Hearings, Senate Armed Services Committee on S. 3096,* 83d Cong., 2d Sess., p. 155. The Directive was issued on April 7, 1954. (R. 33).

Department's belief that, in the eyes of the public, the Honorable Discharge carries with it the Department's stamp of approval of the good character, trustworthiness and loyalty of the former serviceman, as well as an attestation that his performance was satisfactory in all significant respects." *Report of the Commission on Government Security*, 146 (1957). But prior to 1954 the Army never attempted to base the character of the discharge certificate on pre-induction conduct, or on constitutional activities extraneous to the character of the actual military service performed. Indeed, *AR 615-375*, Par. 2(b), the Army Regulation interpreting the Act of May 5, 1950, 64 Stat. 145, 10 U.S.C. 652a (a reenactment by Congress without material change of Article 108 of the Articles of War, 41 Stat. 809, 10 U.S.C. 1580,[16] specifically provides that the "purpose of a discharge certificate is to * * * *specify the character of service during the period covered by the discharge.*"[17] Clearly, therefore, respondent was not validly authorized to stigmatize petitioner for life with a less-than "Honorable Discharge" certificate by reason of constitutionally protected and non-criminal conduct extraneous to the character of his actual military service. Cf. *Federal Trade Commission* v. *Bunte Bros. Inc.*, 312 U.S. 349, 352.

Former Private Harmon was *inducted* into the Army on October 31, 1952; he was required by law to

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[16] *S. Rep. No. 486 on H.R. 4080*, 81st Cong. 1st Sess., pp. 34, 39 (1949)

[17] An "Honorable Discharge" is a badge of honor, but it is limited to time and place and the particular character of the military service rendered. It is not a certification that a man has not been a rogue in civilian life or that he will not become one after he is discharged. See, *Report of the Commission on Government Security*, 146-147 (1957).

become a member of the Armed Forces. He seeks no reinstatement to active or inactive duty; he seeks only to remove the badge of dishonor imposed by a less-than "Honorable Discharge" as a "security risk." Unlike *Bailey* v. *Richardson,* former Private Harmon seeks no reinstatement to Government employment; unlike *Bailey* v. *Richardson,* we are faced with no abstract claim of privilege to which no constitutional protection attaches. For petitioner's service in the Army, unlike Miss Bailey's federal job, was an *obligation,* not a privilege. Respondent was authorized to discharge Harmon if he was not satisfied to keep him in the Army, but he was not authorized to discharge him and defame him at the same time. We think traditional Army discharge policy, as reflected by the rulings of the Attorney General and the Army's Judge Advocate General interpreting the provisions of Article 108 of the Articles of War, 41 Stat. 809, 10 U.S.C. 1580 (*Pet. Br.* 29-32), was incorporated by Congress in Section 4(b) of the Universal Military Training and Service Act of 1948, 62 Stat. 606, 50 U.S.C. App. 454(b). Cf. *Duncan* v. *Kahanamoku,* 327 U.S. 304, 319-324. Accordingly, to the extent that Department of Defense Directive 5210.9 requires the character of an inductee's discharge certificate, whenever retention in the service is deemed "inconsistent with the interests of national security," to be based *"on the gravity of the reasonably substantiated information in derogation,"* [*Directive, Par. VIII(F)(5)*], this Court must hold the Directive invalidly authorized, *ultra vires,* and void. *Pet. Br.* 24-40. Were it otherwise, Section 4(b) of the Universal Military Training and Service Act would be unconstitutional. See, *Keegan* v. *United States,* 325 U.S. 478, 496-498, Black, J. Concurring; cf. *Reid* v.

Covert, 354 U.S. 1, 33; *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 22-23.

CONCLUSION

For the foregoing reasons the judgment of the court below should be reversed.

Respectfully submitted,

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